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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Rameses Te Lomingkit, Individually And
On Behalf Of All Others Similarly
Situated,

Plaintiff,

v.

Apollo Education Group, Inc. (F/K/A
Apollo Group, Inc.); Peter V. Sperling,
Gregory W. Cappelli; Brian L. Swartz; and
William Pepicello,

Defendants.

No. 2:16-cv-00689-PHX-JAT

CLASS ACTION

**LEAD PLAINTIFF'S UNOPPOSED
MOTION FOR APPROVAL OF
DISTRIBUTION PLAN AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Judge: Hon. James A. Teilborg
Courtroom: 503

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**NOTICE OF LEAD PLAINTIFF'S UNOPPOSED MOTION
FOR APPROVAL OF DISTRIBUTION PLAN**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Lead Plaintiff Government of Guam Retirement Fund hereby moves for entry of the accompanying [Proposed] Order Approving Distribution Plan (the "Class Distribution Order"), pursuant to Rule 23(e)(1) of the Federal Rules of Civil Procedure, that will, *inter alia*: (i) approve the administrative determinations of the Court-approved Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), accepting and rejecting Claims submitted in connection with the Settlement reached in the above-captioned Action as stated in the accompanying Declaration of Adam Walter (the "Walter Declaration"); (ii) direct the Initial Distribution of the Net Settlement Fund to Claimants whose Claims are accepted by A.B. Data as valid and approved by the Court ("Authorized Claimants"); (iii) direct that distribution checks state that the check must be cashed within 90 days after the issue date; (iv) direct that Authorized Claimants will forfeit all recovery from the Settlement if they fail to cash their distribution checks in a timely manner; (v) approve the recommended plan for any funds remaining after the distribution; (vi) approve A.B. Data's fees and expenses incurred and estimated to be incurred in the administration of the Settlement; (vii) release claims related to the administration process; and (viii) authorize the destruction of Claim Forms and supporting documents at an appropriate time.¹

The grounds for this motion are that the Court entered its Order Approving Plan of Allocation of Net Settlement Fund (ECF No. 122) and Judgment Approving Class Action Settlement (ECF No. 124) (the "Judgment") and the Effective Date of the Settlement has occurred. In accordance with paragraph 29 of the Stipulation, Lead Plaintiff respectfully

¹ Unless otherwise defined herein, all capitalized terms have the meaning set forth in the accompanying Declaration of Adam Walter in Support of Lead Plaintiff's Unopposed Motion for Approval of Distribution Plan ("Walter Declaration" or "Walter Decl.") or the Stipulation and Agreement of Settlement dated February 8, 2019 (ECF No. 109-1) (the "Stipulation").

1 asks the Court to enter the Class Distribution Order approving the Distribution Plan.
2 Defendants have no legal interest in the relief requested herein (*see* Stipulation ¶¶ 20, 24,
3 and Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement
4 Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement
5 of Litigation Expenses (the "Notice") ¶ 45), and there are no disputed Claims by any
6 Settlement Class Member requiring Court review. As such, the motion is ripe for
7 determination and the Net Settlement Fund may be distributed to Authorized Claimants.

8 This motion is based on the following Memorandum of Points and Authorities, the
9 accompanying Walter Declaration and its exhibits, submitted on behalf of Claims
10 Administrator A.B. Data, all other prior pleadings and papers in this Action, arguments of
11 counsel, and any additional information or argument that may be required by the Court. A
12 [Proposed] Class Distribution Order Plan is filed as an attachment hereto.

13 **STATEMENT OF ISSUES TO BE DECIDED**

- 14 1. Whether the Court should enter the proposed Class Distribution Order
15 which will, among other things, approve the Claims Administrator's
16 administrative determinations accepting and rejecting Claims submitted in
17 connection with the Settlement; and
18 2. Whether the Court should approve the recommended plan for any funds
19 remaining after the distribution and approve the Claims Administrator's
20 fees and expenses.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Lead Plaintiff, on behalf of itself and the Settlement Class, respectfully submit this
3 memorandum in support of their motion for approval of Distribution Plan.

4 **PRELIMINARY STATEMENT**

5 In accordance with the Order Preliminary Approving Settlement and Authorizing
6 Dissemination of Settlement Notice (ECF No. 112) (“Preliminary Approval Order”) entered by the Court, A.B. Data mailed the Notice and the Proof of Claim and Release
7 Form (the “Claim Form” or “Proof of Claim” and, collectively with the Notice, the
8 “Notice Packet”) to potential Settlement Class Members, brokers, and other nominees.
9 Walter Decl. ¶ 2. As stated in the Walter Declaration, A.B. Data disseminated 59,732
10 Notice Packets to potential Settlement Class Members and nominees. *Id.* ¶ 4. The Notice
11 informed Settlement Class Members that if they wished to be eligible to participate in the
12 distribution of the Net Settlement Fund, they were required to submit a properly executed
13 Claim received or postmarked no later than July 19, 2019. *Id.* ¶ 7.

14 On June 27, 2019, the Court entered the Order Approving Plan of Allocation of
15 Net Settlement Fund (ECF No. 122) and Judgment Approving Class Action Settlement
16 (ECF No. 124) (the “Judgment”). The Effective Date of the Settlement has occurred.
17 Accordingly, the Net Settlement Fund may now be distributed to Authorized Claimants.
18 In accordance with paragraph 29 of the Stipulation, Lead Plaintiff respectfully asks the
19 Court to enter the Class Distribution Order approving the Distribution Plan.²

20 **ARGUMENT**

21 **I. CLAIMS ADMINISTRATION**

22 As detailed in the accompanying Walter Declaration, through June 25, 2020, A.B.
23 Data received and processed 18,167 Claims. Walter Decl. ¶ 7. All Claims received
24 through June 25, 2020, have been fully processed in accordance with the Stipulation and
25

26
27 ² The Court retained continuing jurisdiction over, among other things, implementing the
28 Settlement, including the disposition of the Settlement Fund and any motion to approve the Class Distribution Order. *See* Judgment ¶ 15.

1 the Court-approved Plan of Allocation included in the Notice (*id.*), and A.B. Data has
2 worked with Claimants to help them perfect their Claims (*see id.* ¶¶ 19-26).

3 As discussed in the Walter Declaration, many of the Claims submitted in the
4 Settlement were initially deficient or ineligible for one or more reasons, including being
5 incomplete, not signed, not properly documented, or otherwise deficient, which required
6 substantial follow-up work by A.B. Data. *Id.* ¶¶ 19, 22.

7 If A.B. Data determined a Claim to be defective or ineligible, a letter (if the
8 Claimant filed a paper Claim), or an email (if the Claimant filed an electronic Claim),
9 was sent by A.B. Data to the Claimant or filer, as applicable, describing the defect(s) or
10 condition(s) of ineligibility in the Claim and what was necessary to cure any curable
11 defect(s) in the Claim (“Deficiency Notices”). *Id.* ¶¶ 20, 23. The Deficiency Notices
12 advised the Claimant or filer that the appropriate information or documentary evidence to
13 complete the Claim had to be sent within 20 days from the date of the letter or email, or
14 A.B. Data would recommend the Claim for rejection to the extent the deficiency or
15 condition of ineligibility was not cured. *Id.* Examples of the Deficiency Notices are
16 attached as Exhibit A and Exhibit B to the Walter Declaration.

17 **A. No Disputed Claims**

18 A.B. Data carefully reviewed Claimants’ and filers’ responses to the Deficiency
19 Notices and worked with them to resolve deficiencies where possible. *Id.* ¶¶ 21, 26.
20 Consistent with paragraph 27(e) of the Stipulation, the Deficiency Notices specifically
21 advised the Claimant or filer of the right, within 20 days after the mailing or e-mailing of
22 the Deficiency Notice, to contest the rejection of the Claim and request Court review of
23 A.B. Data’s administrative determination of the Claim. *Id.* ¶¶ 20, 23, and Exhibits A and
24 B. There are no requests for Court review by any Claimants. *Id.* ¶ 28.

25 As shown in the Walter Declaration, of the 18,167 Claims that are the subject of
26 this motion, A.B. Data has determined that 10,931 are acceptable in whole or in part, and
27 that 7,236 should be wholly rejected because they are ineligible for payment from the Net
28 Settlement Fund. *Id.* ¶¶ 33-36. Lead Plaintiff respectfully requests that the Court approve

1 A.B. Data's administrative determinations accepting and rejecting Claims as stated in the
2 Walter Declaration.

3 **B. Late Claims – and Final Cut-Off Date**

4 The 18,167 Claims received through June 25, 2020, include 422 that were
5 postmarked or received after the Court-approved Claim submission deadline of October
6 18, 2019, but that were received before June 25, 2020. *Id.* ¶¶ 29, 35. Those late Claims
7 have been fully processed, and 216 of them are, but for their late submission, otherwise
8 eligible to participate in the Settlement. *Id.* Although these 216 Claims were late, they
9 were received while the processing of timely Claims was ongoing. Due to the amount of
10 time needed to process the timely Claims received, the processing of these late Claims
11 did not delay the completion of the Claims administration process or the distribution of
12 the Net Settlement Fund. The Court has discretion to accept Claims received after the
13 Claim submission deadline.³ Lead Plaintiff respectfully submits that, when the equities
14 are balanced, it would be unfair to prevent an otherwise eligible Claim from participating
15 in the distribution of the Net Settlement Fund solely because it was received after the
16 Court-approved Claim submission deadline, if it was submitted while timely Claims were
17 still being processed.

18 To facilitate the efficient distribution of the Net Settlement Fund, however, there
19 must be a final cut-off date after which no other Claims may be accepted. Accordingly,
20 Lead Plaintiff respectfully requests that this Court order that any new Claims and any
21 adjustments to previously filed Claims that would result in an increased Recognized
22 Claim amount received after June 25, 2020, be barred, subject to the provisions of

23 ³ See Notice ¶ 47 (“*Unless the Court otherwise orders, any Settlement Class Member*
24 *who fails to submit a Claim Form postmarked on or before July 19, 2019 shall be fully*
25 *and forever barred from receiving payments pursuant to the Settlement...*”) (emphasis
26 added). See also Preliminary Approval Order ¶ 10 (“*Unless the Court orders otherwise,*
27 *all Claim Forms must be postmarked no later than one hundred twenty (120) calendar*
28 *days after the Notice Date. Notwithstanding the foregoing, Lead Counsel may, at its*
discretion, accept for processing late Claims provided such acceptance does not delay the
distribution of the Net Settlement Fund to the Settlement Class.”) (emphasis added).

paragraph 39(f) of the Walter Declaration.⁴ Paragraph 39(f) applies to any Claims received or modified after June 25, 2020, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received. At the time when Lead Counsel, in consultation with A.B. Data, determines that a further distribution is not cost-effective as provided in paragraph 39(e) of the Walter Declaration, the post-June 25, 2020 Claimants, after payment of fees and expenses as provided in paragraph 39(f) of the Walter Declaration, at the discretion of Lead Counsel and to the extent possible, may be paid the distribution amounts or additional distribution amounts on a pro rata basis that would bring them into parity with other Authorized Claimants who have cashed all their prior distribution checks.

II. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with A.B. Data's engagement in this litigation, A.B. Data was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. Walter Decl. ¶ 2. As stated in the accompanying Walter Declaration, A.B. Data's fees and expenses for its work performed through July 31, 2020, are \$192,290.78 and estimated fees and expenses in connection with the Initial Distribution are \$15,644.34.⁵ Walter Decl. ¶ 38 and Ex. G. To date, A.B. Data has received payment in the amount of \$184,248.31 for its fees and expenses. *Id.* ¶ 38. Accordingly, there is an outstanding balance of \$23,686.81 payable to A.B. Data, which amount includes the estimated fees and expenses to be incurred by A.B. Data in connection with the Initial

⁴ Should an adjustment be received that results in a lower Recognized Claim amount, that adjustment will be made, and the Recognized Claim amount will be reduced accordingly before a distribution to that Claimant. Walter Decl. ¶ 30.

⁵ Should the estimate of fees and expenses to conduct the Initial Distribution of the Net Settlement Fund exceed the actual cost to conduct the distribution, the excess will be returned to the Net Settlement Fund and will be available for subsequent distribution to Authorized Claimants. Walter Decl. ¶ 38 n.2.

1 Distribution. *Id.* Lead Counsel reviewed A.B. Data’s invoices and respectfully requests
 2 on behalf of Lead Plaintiff that the Court approve all of A.B. Data’s fees and expenses.

3 **III. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND**

4 The Net Settlement Fund is ready to be distributed. Lead Plaintiff respectfully
 5 moves the Court for entry of an order approving A.B. Data’s determinations concerning
 6 acceptance and rejection of the Claims that are included in the present motion and
 7 approving the proposed Distribution Plan as stated in the Walter Declaration (the
 8 “Distribution Plan”).

9 **A. Distribution of the Net Settlement Fund**

10 Under the proposed Distribution Plan, A.B. Data will distribute approximately
 11 95% of the Net Settlement Fund, after deducting all payments previously allowed and the
 12 payments approved by the Court on this motion, and after deducting payment of any
 13 estimated taxes, the costs of preparing appropriate tax returns, any escrow fees, and
 14 appropriate reserves (the “Initial Distribution”). In the Initial Distribution, A.B. Data will
 15 calculate award amounts for all Authorized Claimants. A.B. Data will first determine
 16 each Authorized Claimant’s *pro rata* share of the total Net Settlement Fund based on the
 17 Claimant’s Recognized Claim in comparison to the total Recognized Claims of all
 18 Authorized Claimants. *See* Walter Decl. ¶ 39(a)(1). In accordance with the Court-
 19 approved Plan of Allocation, A.B. Data will eliminate from the Initial Distribution any
 20 Authorized Claimant whose *pro rata* share calculates to less than \$25.00, as these
 21 Claimants will not receive any payment from the Net Settlement Fund and will be so
 22 notified by A.B. Data. *Id.* ¶ 39(a)(2). A.B. Data will then recalculate the *pro rata* share of
 23 the Net Settlement Fund for Authorized Claimants who would have received \$25.00 or
 24 more (the “Distribution Amount”). *Id.* ¶ 39(a)(3). 95% percent of the remaining balance
 25 of the Net Settlement Fund will be distributed *pro rata* to Authorized Claimants whose
 26 Distribution Amount calculates to \$25.00 or more under subparagraph 39(a)(1) of the
 27 Walter Declaration. *Id.* ¶ 39(a)(4). The remaining 5% of the Net Settlement Fund will be
 28 held in reserve (the “Reserve”) to address any tax liability and claims administration-

1 related contingencies that may arise. *Id.* To the extent the Reserve is not depleted, the
 2 remainder will be distributed in the “Second Distribution” described in subparagraph
 3 39(d) of the Walter Declaration. *Id.*

4 In order to encourage Authorized Claimants to cash their checks promptly, Lead
 5 Plaintiff proposes that the Initial Distribution checks bear the notation: “CASH
 6 PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY
 7 [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 39(b). Subsequent distributions will
 8 have a 90-day stale date. *Id.* Authorized Claimants who do not cash their checks within
 9 the time allotted or on the conditions stated in paragraph 39(b) footnote 3 of the Walter
 10 Declaration will irrevocably forfeit all recovery from the Settlement, and the funds
 11 allocated to all of these stale-dated checks will be available to be redistributed to other
 12 Authorized Claimants in any subsequent distribution, as described below. *Id.* ¶ 39(c).

13 **B. Additional Distribution(s) of the Net Settlement Fund**

14 After A.B. Data has made reasonable and diligent efforts to have Authorized
 15 Claimants cash their Initial Distribution checks, but not earlier than seven (7) months
 16 after the Initial Distribution, A.B. Data will, after consulting with Lead Counsel, conduct
 17 a second distribution of the Net Settlement Fund (the “Second Distribution”) within a
 18 reasonable period of time. In the Second Distribution, any amounts remaining in the Net
 19 Settlement Fund after the Initial Distribution (including the funds for all void stale-dated
 20 checks), after deducting A.B. Data’s unpaid fees and expenses incurred in connection
 21 with administering the Settlement (including the estimated costs of the Second
 22 Distribution), and after deducting payment of any estimated taxes, the costs of preparing
 23 appropriate tax returns, any escrow fees, and appropriate reserves, will be distributed to
 24 all Authorized Claimants in the Initial Distribution who cashed their Initial Distribution
 25 checks and would receive at least \$10.00 from the Second Distribution based on their *pro*
 26 *rata* share of the remaining funds. Walter Decl. ¶ 39(d). If, after the Second Distribution,
 27 any funds remain in the Net Settlement Fund because of uncashed checks or otherwise,
 28 then, after A.B. Data has made reasonable and diligent efforts to have Authorized

1 Claimants cash their distribution checks, and if cost-effective, subsequent distributions of
2 the funds remaining in the Net Settlement Fund, after deduction of costs and expenses as
3 described above and subject to the same conditions, will take place after a reasonable
4 period of time. *Id.* When Lead Counsel, in consultation with A.B. Data, determines that
5 further distribution is not cost-effective, the remaining balance of the Net Settlement
6 Fund, after payment of any unpaid fees or expenses incurred in administering the Net
7 Settlement Fund and after the payment of any estimated taxes, the costs of preparing
8 appropriate tax returns, any escrow fees, and appropriate reserves, will be contributed to
9 non-sectarian, not-for-profit, 501(c)(3) organization(s), to be recommended by Lead
10 Counsel and approved by the Court. *Id.* ¶ 39(e).

11 **IV. RELEASE OF CLAIMS**

12 In order to allow the full and final distribution of the Net Settlement Fund, it is
13 necessary to bar any further claims against the Net Settlement Fund beyond the amounts
14 allocated to Authorized Claimants, and to provide that all persons involved in the review,
15 verification, calculation, tabulation, or any other aspect of the processing of the Claims
16 submitted in connection with the Settlement, or who are otherwise involved in the
17 administration or taxation of the Settlement Fund or the Net Settlement Fund, be released
18 and discharged from all claims arising out of that involvement. Accordingly, Lead
19 Plaintiff respectfully requests that the Court release and discharge all persons involved in
20 the review, verification, calculation, tabulation, or any other aspect of the processing of
21 the Claims submitted in connection with the Settlement, or who are otherwise involved in
22 the administration or taxation of the Settlement Fund or the Net Settlement Fund from all
23 claims arising out of that involvement, and bar all Settlement Class Members and other
24 Claimants, whether or not they receive payment from the Net Settlement Fund, from
25 making any further claims against the Net Settlement Fund, Lead Plaintiff, Lead Counsel,
26 the Claims Administrator, the Escrow Agent, or any other agent retained by Lead
27 Plaintiff or Lead Counsel in connection with the administration or taxation of the
28

Settlement Fund or the Net Settlement Fund or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants..

CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that Lead Plaintiff's Unopposed Motion for Approval of Distribution Plan should be granted, and the [Proposed] Order Approving Distribution Plan should be entered.

Dated: August 19, 2020

Respectfully submitted,

By: /s/ Jonathan D. Uslaner

Jonathan D. Uslaner

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